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FILED
OCT 27 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

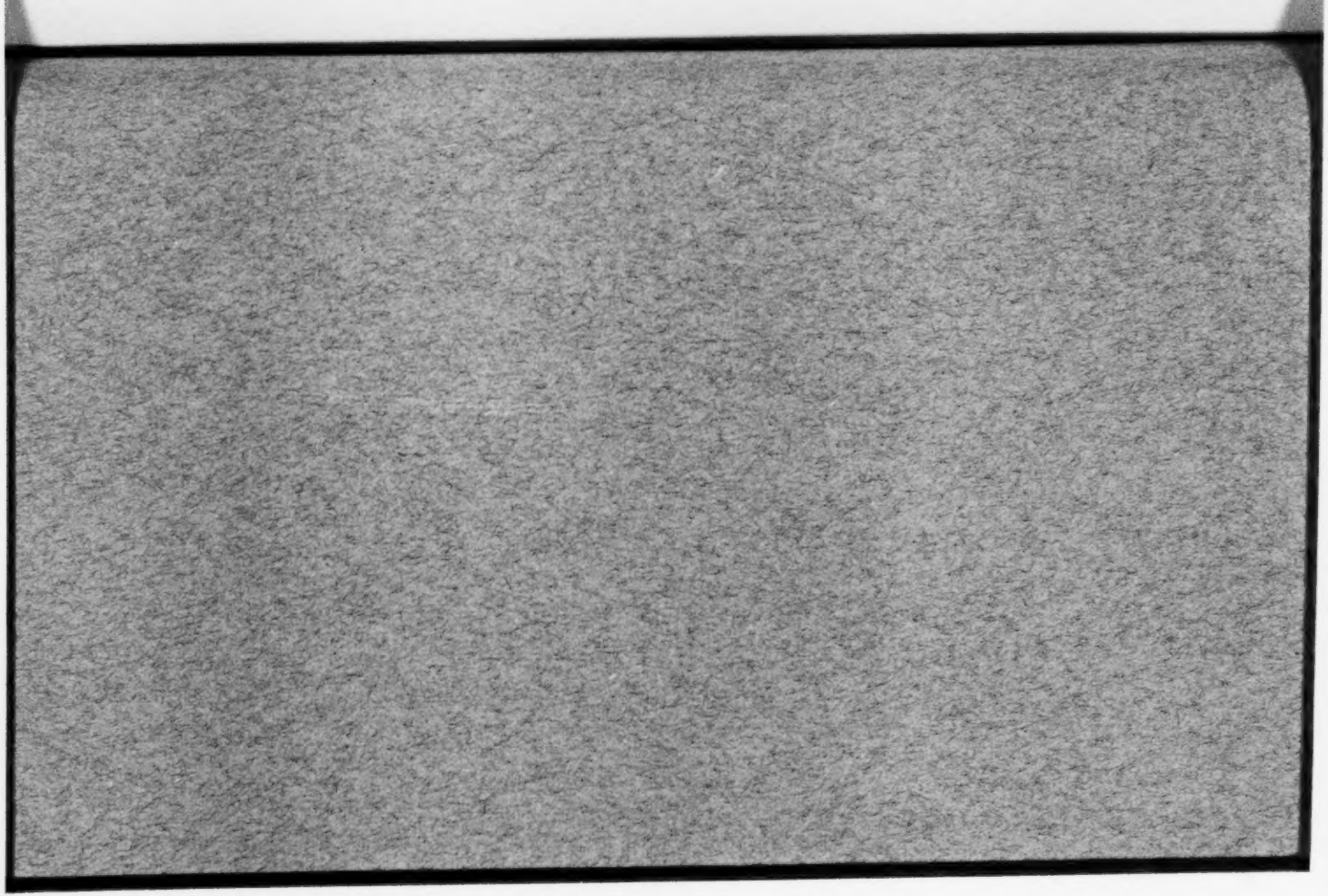
OCTOBER TERM 1944

No. 361

In the Matter of the Application of the
UNITED STATES OF AMERICA,
Respondent,
for a Writ of Prohibition and/or Mandamus
against
The HONORABLE FRANCIS G. CAFFEY, Judge of the District Court of the United States for the Southern District of New York, et al.,
Petitioners.

PETITION FOR REHEARING

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
LEONARD J. MATTESON,
RICHARD F. SHAW,
Counsel for Petitioners.



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COME NOW the above named the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York, et al., and present this, their petition for a rehearing on their petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause, and, in support thereof, respectfully show:

The petition for a writ of certiorari in this case was filed August 30, 1944.

The order of this Court denying the petition for certiorari was entered October 16, 1944.

On October 9, 1944 this Court granted a petition for certiorari in Case No. 279 October Term 1944, Canadian Aviator, Ltd., petitioner, against United States of America, respondent.

Closely related questions involving the same provisions of the same Statute, Public Vessels Act, Title 46, U. S. Code, §§781-790, authorizing suit against the United States to recover for damages sustained by a privately owned vessel "caused by a public vessel of the United States * * *" are presented in these two cases.

The actions involved both in No. 279 and in this case are suits against the United States under the provisions of the Public Vessels Act for damage alleged to have been "caused by a public vessel of the United States". In each action the libellant elected to proceed in accordance with the principles of libels *in rem* as well as *in personam*. Such election was deemed to have been authorized by the provisions of Section 2 of the Public Vessels Act, reading as follows:

> "* * * Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed."

Chapter 20 referred to is the Suits in Admiralty Act, Section 3, which provides in part:

> "Such suits shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties * * *. If the libellant so elects in his libel, suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit * * *" (46 U. S. Code, §743).

Both in No. 279 and in this case the question is presented whether the Public Vessels Act does in fact author-

ize a suit against the United States to proceed in accordance with the principles of a libel *in rem*, and if so the limitations, if any, on the principles of a libel *in rem* as applied to such a suit. Cf. Third Point, Petitioners' Brief in No. 279, p. 18, and Fourth Point of Petitioners' Brief in this case, p. 17.

As this case now stands the decision of the Circuit Court of Appeals may well be considered as authority for the proposition that the Public Vessels Act does not authorize a suit *in personam* against the United States on the principles of a libel *in rem*. Such a proposition is directly opposed to the view expressed by the Attorney General (now Mr. Chief Justice Stone) in his letter to the Committee on Claims concerning the bill which became the Public Vessels Act. See Petitioners' Brief, p. 18.

Both this case and No. 279 for their decision require a review of the legislative history of the Public Vessels Act with view to discovering the legislative intent as disclosed thereby. Cf. Second Point, Petitioners' Brief, in No. 279, p. 14, and Third Point of Petitioners' Brief in this case, p. 14.

Case No. 279 further involves the question under what circumstances damage is considered to have been "done by" a public vessel of the United States and this case involves the question under what circumstances a vessel will be considered to be "a public vessel of the United States".

If a writ of certiorari were to be granted in this case and this case were to be argued together with No. 279 many considerations would be pertinent to both cases and the same counsel are involved except that in this case counsel representing the cargo interest appear jointly with counsel representing the vessel interest.

The question presented in this case is of at least as great importance to owners of vessels and other property in this country as the question presented in Case No. 279, for the decision of the Circuit Court of Appeals in this case wholly excludes such owners from the benefits of the Act in a large class of cases, whereas Case No. 279 involves only a limitation on the scope of the relief granted where the public vessel involved is admittedly one with respect to which relief is granted by the Act when damage is done by such vessel.

The decision of the Circuit Court of Appeals in this case refusing relief under the Public Vessels Act to the owners of the *Brazos* for damage done by a public vessel owned by the United States (*The Archer*) has denied the principle of reciprocity on which the Public Vessels Act is based,—namely, that in cases where suit could be maintained by the United States as owner of the public vessel against the privately owned vessel for damage caused by collision, a suit may likewise be brought by the owner of the privately owned vessel against the United States. See Petitioners' Brief, pp. 15, 16. The *Archer,* which collided with and sank the *Brazos,* was owned by the United States and, even though the *Archer* had been chartered or lease-loaned to the British Government, the United States as owner of the *Archer* could have maintained an action against the *Brazos* or her owner for damage resulting from the collision and undoubtedly would have brought such action except for the sinking of the *Brazos* and the larger loss sustained by her owners. Yet the owners of the *Brazos* have been denied the right to maintain this action against the United States.

The question presented by the petition in this case is stated at p. 5 of the petition as follows:

> "Does the Public Vessels Act, Title 46, U. S. Code, §§ 781-790, authorize suit against the United States on principles of in rem liability to recover damages caused by a war vessel owned by, and documented as, a vessel of the United States but in the possession of the British Government and operated as a unit of its Navy pursuant to the provisions of the Lend-Lease Act in the interest of the national defense of the United States?"

For the foregoing reasons, it is respectfully urged that this petition for a rehearing on the petition for a writ of certiorari be allowed, and that upon further consideration the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause be granted, and that this case be set for argument to follow No. 279, October Term 1944, on the Calendar of this Court.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
LEONARD J. MATTESON,
RICHARD F. SHAW,
Counsel for Petitioners.

Certificate of Counsel

I, CHAUNCEY I. CLARK, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing on the petition for a writ of certiorari in the above entitled cause is presented in good faith and not for delay.

CHAUNCEY I. CLARK,
Counsel for Petitioners.

(P-694)